86-730

No.

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1986

GERALDINE G. CANNON,

Petitioner,

v.

LOYOLA UNIVERSITY OF CHICAGO, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN M. CANNON
Attorney for Petitioner

Suite 1725
20 N. Wacker Dr.
Chicago, Illinois 60606
(312) 263-5163

October 1986

Pandick Technologies, Inc., Chicago • (312) 236-0200

31pp

QUESTIONS PRESENTED

1. Whether the jurisdictional exception to dismissals which operate as adjudications on the merits under Rule 41(b) of the Federal Rules of Civil Procedure is limited to dismissals for lack of subject matter jurisdiction to reach the merits of any claim sought to be stated or for lack of jurisdiction to decide whether any claim upon which relief may be granted has been properly stated.

2. Whether a judgment affirmed, in part, for lack of federal jurisdiction over legal claims for monetary relief by reason of the Eleventh Amendment and, in part, on grounds of laches as to the related equitable claims, constitutes a final judgment on the merits and bars any further claims on the same cause of action under the doctrine of *res judicata.*

[Note: Petitioner reserves the right to argue Question 3 in the event certiorari is granted on either or both of the above questions, but does not include Question 3 among the reasons for the grant of certiorari.]

3. Whether affirmative answers to both of the above questions are so clear as to warrant the imposition of sanctions for maintaining this action, particularly where the district court did not accept the respondents' affirmative position on the first question.

PARTIES

The parties to the proceeding in the court of appeals were the petitioner, Geraldine G. Cannon, and seven respondents:

Loyola University of Chicago (*"Loyola"*),

Northwestern University (*"Northwestern"*),

Rush-Presbyterian-St. Luke's Medical Center (*"Rush"*),

Southern Illinois University (*"S.I.U."*),

The University of Chicago (*"Chicago"*),

University of Health Sciences/The Chicago Medical School (*"Chicago Medical"*), and

the board of trustees of the University of Illinois (*"Illinois"*).

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No.

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v.

LOYOLA UNIVERSITY OF CHICAGO, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Geraldine G. Cannon, prays, that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in the above – entitled case. No. 85-1987 (7th Cir. 1986).

OPINION BELOW

The opinion of the court of appeals is reported at 784 F.2d 777, and a copy of the slip opinion is set out in the Appendix to this petition at A-1. The opinion of the district court is reported at 609 F.Supp. 1010 (N.D. Ill. 1985).

JURISDICTION

The judgment of the court of appeals is dated February 25, 1986. A timely petition for rehearing was denied on April 3, 1986 and a supplemental petition for rehearing filed with leave of court was denied on May 27, 1986. On August 14, 1986, Justice Brennan signed an order extending the time for filing this petition for writ of certiorari to and including October 24, 1986. No. A-110. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioner brought this action for breach of contract, asserting that each respondent's former age criterion for admission to medical school violated the public policy set out in Title IX of the Education Amendments of 1972 (*"Title IX"*), 20 U.S.C. §1681 *et seq.* She claimed that the illegal age criterion should be excluded from the terms on which each respondent had agreed to consider her application and that use of the age criterion violated the agreement to observe Title IX in each respondent's federal funding contract. Jurisdiction in the district court was based on 28 U.S.C. §§1331 and 1343 (4).

The district court dismissed the complaint, holding that prior judgments in three related actions constitute a bar to the present action on the basis of general preclusion principles and awarded respondents their attorneys' fees pursuant to Rule 11, Fed.R.Civ.P. The court of appeals affirmed holding that the jurisdictional exception to dismissals which operate as adjudications on the merits under Rule 41(b), Fed.R.Civ.P., did not apply to the dismissal of petitioner's prior complaints for failure to state a claim upon which relief could be granted in federal court. It reasoned that the district court had subject matter jurisdiction to reach the merits of claims petitioner

had sought to state against Chicago and Northwestern in the first two prior actions. It further reasoned that the question of whether the prior complaints against those schools had properly stated a claim upon which relief could be granted must have been decided after and not before the court had assumed jurisdiction over the controversy. App. at A-4 to A-6. The court of appeals further held that partial summary judgments on grounds of laches in a third prior action against the five other respondents, Chicago Medical, Loyola, Rush, S.I.U. and Illinois, barred the present action against them even though related legal claims for monetary relief against S.I.U. and Illinois had been dismissed on the basis of their jurisdictional immunity under the Eleventh Amendment. App. at A-6 to A-8.[1]

The Prior Cases.

Petitioner had commenced the first two prior actions against Chicago and Northwestern in the summer of 1975. She claimed that the age criterion of each school, due to its alleged disparate impact upon women, violated Title IX and Section 799 of the Public Health Service Act, 42 U.S.C. §295h-9; and directly violated the Civil Rights Act of 1871, 42 U.S.C. §1983, and the Equal Protection Clause of the Fourteenth Amendment, the Age Discrimination in Employment Act of 1967 ("*ADEA*"), 29 U.S.C. §626, and Ill.Rev.Stat Ch.48, Sec. 884 *et seq.*, the Illinois Act to prohibit unjust discrimination in employment because of age. The district court dismissed the complaints because (1) there were

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[1] The court of appeals did not repeat or rely upon the district court's improper and inaccurate application of general preclusion principles on the basis of matters outside the complaint. Rule 12(b), Fed.R.Civ.P., prohibits the consideration of matters outside the pleading on a motion to dismiss for failure to state a claim upon which relief may be granted without treatment of the motion as one for summary judgment. Respondents' Rule 12(b)(6) motions were not so treated. Petitioner acknowledged that this action would be barred if the district court's statements on matters outside the pleading were accurate. They were not.

no sufficient allegations of state action to support a claim under §1983 and the Fourteenth Amendment; (2) no claim was stated under the ADEA because the schools were not primarily employers or employment agencies; and (3) no private right of action existed under Title IX or the Public Health Service Act. With that dismissal of all federal claims before trial, the district court did not exercise pendent jurisdiction to rule upon petitioner's claims under state law. *Cannon v. University of Chicago et al.*, 406 F.Supp. 1257 (N.D.Ill. 1976). The court of appeals affirmed. 559 F.2d 1063 (7th Cir. 1977). Petitioner was granted a writ of certiorari on the question of whether Title IX authorized a private right of action. This Court reversed and remanded, holding that Title IX did authorize a private right of action. 441 U.S. 677 (1979).

After remand, the district court again dismissed the actions on the ground that the complaints failed to allege specific facts on which a finding of intentional discrimination could be based pursuant to petitioner's general allegation that the schools' conduct was "arbitrary and invidious". (Unpublished orders N.D.Ill.Nos. 75 C 2402 and 75 C 2724, May 23, 1980.) The court of appeals affirmed the second dismissal. 648 F.2d 1104 (7th Cir. 1981). Contrary to the district court, however, it held that the allegation of arbitrary and invidious conduct was no longer applicable after the §1983 claims had been dismissed. *Id.* at 110. Also contrary to the district court, it observed that while the liberal pleading requirements of Rule 9(b), Fed.R.Civ.P., provide that intent may be pleaded generally, the arbitrary and invidious language contained no necessary implication of intentional discrimination *Ibid.*

Petitioner then moved for leave either to amend her complaints or to present motions to amend in the district court on the ground that she already had offered amendments alleging intentional discrimination against women under Title IX in response to the schools' district court argument that the arbitrary and invidious allegation was no longer applicable.

The motion was denied without comment. Thereafter, this Court denied certiorari to review the judgment and opinion of the court of appeals which had focused primarily on the issue of whether intentional discrimination was required to violate Title IX. 454 U.S. 1128 (1981). Petitioner had maintained that issue was premature because she proposed to meet the intentional standard in the district court.[2] On later appeals from the denial of petitioner's motions for relief from judgment in order to amend under Rules 15(a) and 60(b), Fed.R.Civ.P., the court of appeals explained that amendment ordinarily is not allowed after the affirmance of a judgment on appeal and that, without leave of the appellate court, the district court lacks jurisdiction to allow amendment. (Unpublished orders 7th Cir. Nos. 82-1107 and 82-1120, May 13, 1982 and October 6, 1982).

Meanwhile, petitioner had filed a single suit against Chicago Medical, Loyola, Rush, S.I.U. and Illinois in 1979. As in the suits against Chicago and Northwestern, she claimed that denial of her medical school applications constituted sex discrimination in violation of Title IX. She also claimed that the schools' age criteria for admission violated the Age Discrimination Act of 1975, 42 U.S.C. §6101 *et seq.*, and that the two state schools, S.I.U. and Illinois, had violated §1983 and the Fourteenth Amendment.

The district court allowed petitioner to amend the complaint pursuant to Rule 15(a), Fed.R.Civ.P., with an allegation of intentional discrimination against women under Title IX to cure the defect for which the court of appeals had affirmed the dismissal of the prior complaints against Chicago and Northwestern. It held, however, that no relief against any

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[2] *See*, 648 F.2d at 1105 n.1. Thereafter, in *Guardians Assn. of Police v. Civil Service Comm. of the City of N.Y.*, 463 U.S. 582 (1983), this Court upheld an "effect" standard in the applicable regulations under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq.*, the legislation on which Title IX was patterned.

of the schools could be had under the Age Discrimination Act, as that Act had not yet taken effect at the time her applications were rejected. The district court further held that no monetary relief could be obtained under Title IX and that the Eleventh Amendment barred the recovery of monetary relief from S.I.U. and Illinois in federal court under §1983 and the Fourteenth Amendment. The district court entered judgment dismissing the legal claims for damages and granting partial summary judgments on the remaining equitable claims against each school. The partial summary judgments in favor of Rush, Loyola and Chicago Medical were based on grounds of laches and those in favor of S.I.U. and Illinois on grounds of mootness. The district court also noted that all of the schools were entitled to summary judgment for mootness on the Title IX claims as well because they all had abolished age as a criterion for admission to their 1980 and subsequent entering classes. (Unpublished orders N.D.Ill.No.79 C 5009, October 13, 1981 and June 15, 1982).

The court of appeals affirmed the dismissal of legal claims for monetary relief which were governed by the statute of limitations on the same Title IX and Eleventh Amendment grounds as the district court had based such dismissal. The court of appeals, however, affirmed the partial summary judgments in favor of each school on the remaining equitable claims solely on grounds of laches. It did not affirm the district court's ruling on mootness. *Cannon v. University of Health Sciences, et al.*, 710 F.2d 351 (7th Cir. 1983).

Since the court of appeals already had ruled in the first two cases that amendment ordinarily is not allowed after the affirmance of a dismissal on appeal, even where the same amendment was concurrently allowed under Rule 15(a) in the third related case which then was still in the district court, and since petitioner could not request leave to amend after appeal on the ground that the statute of limitations had expired on her contract claims while she appealed the mootness ruling, this action followed.

REASONS FOR GRANTING THE WRIT

The Court should grant this petition for a writ of certiorari for two reasons that the Court has traditionally found compelling. First, the decision of the court of appeals, limiting the jurisdictional exception in Rule 41(b) to dismissals for lack of subject matter jurisdiction to reach the merits of any claim sought to be stated or for lack of jurisdiction to decide whether any claim upon which relief may be granted had been properly stated, has decided a federal question in a way in conflict with the decision of this Court in *Costello v. United States*, 365 U.S. 265 (1961). Such limitation also conflicts with decisions of the Fifth and Ninth Circuits in *Carter v. Telectron, Inc.*, 554 F.2d 1369 (5th Cir. 1977), *cert. denied* 439 U.S. 1074 (1979), and *Johnston v. Earle*, 245 F.2d 793 (9th Cir. 1957). Second, the court of appeals has decided an important question of federal law under the Eleventh Amendment which has not been, but should be, settled by this Court.

I. The Decision Below Conflicts With Decisions Of This Court And Of Other Courts Of Appeals On The Jurisdictional Exception In Rule 41(b).

The court of appeals based its holding that the jurisdictional exception to dismissals which operate as adjudications on the merits under Rule 41(b) is not applicable to the dismissal of petitioner's prior claims against Chicago and Northwestern on two grounds. Both grounds conflict with the decision of this Court in *Costello* and with the decisions of the Fifth and Ninth Circuits in *Carter* and *Johnston*.

First, the court of appeals held that the district court had subject matter jurisdiction to reach the merits of the claims petitioner had sought to state against Chicago and Northwestern under 28 U.S.C. §1331. App. at A-6. That is clearly correct. It was also clearly true that the district court had subject matter jurisdiction to reach the merits of the claims sought to be stated in the prior actions involved in *Costello, Carter* and *Johnston*. Indeed, this Court squarely held in *Costello* that the jurisdictional exception in Rule 41(b) is not limited to prior judgments which are void or subject

to collateral attack for lack of jurisdiction over the person or subject matter. 365 U.S. at 285.

Second, the court of appeals held that the dismissal of petitioner's prior complaints against Chicago and Northwestern was an adjudication on the merits because the question of whether the complaints stated a cause of action on which relief could be granted must have been decided after and not before the court had assumed jurisdiction over the controversy, citing *Bell v. Hood*, 327 U.S. 678, 681-82 (1945). It was also true that the question of whether the prior complaints involved in *Costello, Carter* and *Johnston* had stated a claim upon which relief could be granted must have been decided after and not before the courts had assumed jurisdiction over those controversies. Nevertheless, this Court in *Costello* and the Fifth and Ninth Circuits in *Carter* and *Johnston* all held that dismissal of the prior complaints for failure to state a claim upon which relief could be granted resulted in a lack of jurisdiction and did not bar further claims on the same cause of action under the doctrine of *res judicata.*

The decision of this Court in *Bell* did not involve either Rule 41(b) or the doctrine of *res judicata.* Accordingly, *Bell* can provide only *obiter dictum* in support of the decision below. The Ninth Circuit in *Johnston* held that failure of a complaint to state a proper claim under the laws of the United States required dismissal for lack of jurisdiction under 28 U.S.C. §1331. The jurisdiction of a court under *Bell* even to consider whether it had jurisdiction was expressly distinguished. 245 F.2d at 795-96. In *Carter* the Fifth Circuit held that failure to state a proper claim under federal civil rights law has the effect of depriving federal courts of subject matter jurisdiction "and renders the court powerless to make a decision on the merits" thus requiring dismissal "for lack of jurisdiction" under Rule 41(b). 554 F.2d at 1370.

> "If a dismissal is for a defect in pleadings that does not reach the merits, as is generally true for a dismissal under Rule 12(b)(6), it is inconsistent with the

whole spirit of the rules to regard the dismissal as an adjudication upon the merits."

9 Wright and Miller, Federal Practice and Procedure §2373 p.239.

II. The Decision Below Presents An Important Question of Federal Law Under The Eleventh Amendment That Should Be Settled By This Court.

The Eleventh Amendment decisions of this Court have balanced the limitation on the judicial power of the United States with the requirements of the Supremacy Clause. Recently, in *Green v. Mansour,* __U.S.__, 106 S.Ct. 423 (1985), the Court considered the potential effect of the doctrine of *res judicata* based on a federal decision for prospective relief under the Supremacy Clause on the issue of liability resulting in an "end run" around the Eleventh Amendment and *Edelman v. Jordan,* 415 U.S. 651 (1974), by reducing a later state court action for damages to a mere accounting proceeding. This case presents a direct extension of that concern.

Generally, federal courts may entertain actions under the Supremacy Clause for prospective relief from future violation of federal laws, but actions for retrospective monetary relief for past violations are barred by the Eleventh Amendment. A dicision on the merits in a federal action for prospective relief could have a *res judicata* effect on the issue of liability in a later state court action for retrospective relief. Under *Green,* however, when a claim for prospective relief becomes moot, declaratory or notice relief which can impact only on a later state court action is barred by the Eleventh Amendment.

In this case the affirmative defense of laches was sustained with respect to petitioner's prior claims for prospective relief against S.I.U. and Illinois under §1983 and the Fourteenth Amendment. That defense, however, could not have been asserted with respect to petitioner's related legal claims which are governed by the statute of limitations. The application, if any, of the doctrine of *res judicata* under such circumstances

has not been, but should be, settled by this Court.

Petitioner submits that, contrary to the decision of the court of appeals, an Eleventh Amendment dismissal of legal claims by a federal court remains a dismissal "for lack of jurisdiction" and does not operate as an adjudication on the merits under Rule 41(b). There is no federal interest in the defense of laches sufficient to invoke the Supremacy Clause in controlling the outcome of a later proceeding, state or federal, under the doctrine of *res judicata*.

Respondents' position on the questions presented, including the imposition of sanctions, was based primarily on the burden this litigation has placed on them. Petitioner, however, has been subjected to the burden of the same litigation. A decision on the substantive merits of petitioner's civil rights claims has been avoided thus far because the district court granted respondents' motions to dismiss some or all of the claims against each of them on grounds which petitioner could not cure by amendment or refiling. The court of appeals affirmed the prior judgments, but on grounds which she could so cure.[3] While respondents have the right to raise every pleading objection available, they can hardly complain of the burden their pursuit of such objections has engendered, particularly since petitioner offered to meet each objection to the sufficiency of her allegations as soon as the objection was raised.

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[3] *See,* the statement of The Prior Cases at 3 to 6 *supra.*

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully Submitted,

JOHN M. CANNON
Attorney for Petitioner

Suite 1725
20 N. Wacker Dr.
Chicago, Illinois 60606
(312) 263-5163

October 1986

APPENDIX

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In the

United States Court of Appeals

For the Seventh Circuit

No. 85-1987

GERALDINE G. CANNON,

Plaintiff-Appellant,

vs.

LOYOLA UNIVERSITY OF CHICAGO, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 C 8063—Marvin E. Aspen, *Judge.*

ARGUED JANUARY 8, 1986—DECIDED FEBRUARY 25, 1986

Before BAUER, WOOD and COFFEY, *Circuit Judges.*

BAUER, *Circuit Judge.* Plaintiff Geraldine Cannon, ("Mrs. Cannon"), brought suit against seven defendant medical schools claiming that each medical school's denial of her application was a breach of contract because such action was unlawful under Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681 *et seq.* The district court dismissed the complaint, holding that judgments entered against Mrs. Cannon and in favor of the universities in three prior suits constitute a bar to the present action. We affirm the judgment of the district court including its award of attorney fees and costs plus the costs of this appeal to defendants.

I.

Mrs. Cannon applied for admission to the 1975 entering class at each of the defendant medical schools; Loyola University of Chicago; Northwestern University; Rush Presbyterian-St. Lukes Medical Center; Southern Illinois University; University of Health Sciences/The Chicago Medical School; The University of Chicago and The University of Illinois. Each of the schools denied her application. The present appeal marks the plaintiff's thirteenth time she has been before the court to obtain judicial relief from the decisions of the universities not to admit her to medical school ten years ago.

In July of 1975, Mrs. Cannon first brought suits against the University of Chicago ("Chicago") and Northwestern University ("Northwestern"), which were consolidated in the district court and on later appeals. In these actions Mrs. Cannon claimed that Chicago and Northwestern applied an age criterion in rejecting her application that itself violated the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 626, or that, due to its alleged disparate impact upon women, violated the Civil Rights Act of 1871, 28 U.S.C. § 1983, Title IX and/or Section 799 of the Public Health Service Act 42 U.S.C. § 295h-9. The district court dismissed Mrs. Cannon's complaint because (1) there were no sufficient allegations of state action to support an action under § 1983; (2) no claim upon which relief could be granted could be stated under the ADEA because the universities were neither employers nor employment agencies; and (3) no private right of action existed under Title IX or the Public Health Service Act. We affirmed. Plaintiff sought and was granted a writ of certiorari limited solely to the question of the existence of a private right of action under Title IX. The Supreme Court reversed and remanded the case, holding that a private right of action under Title IX was authorized.

Upon remand, Chicago and Northwestern moved to dismiss the complaints on the ground that they failed to state

a claim upon which relief could be granted in that no allegation of "purposeful" discrimination as required by Title IX was set forth. The district court held these motions in abeyance while conducting a six day evidentiary hearing upon Mrs. Cannon's petition for a preliminary injunction. The petition was denied, and we affirmed the denial on April 25, 1980.

On May 23, 1980, the district court granted the universities' motions and dismissed the complaints on the ground that plaintiff failed to state a claim because she failed to allege that the defendants had purposefully discriminated against her because of her sex. We affirmed, holding that a violation of Title IX required purposeful discrimination. Plaintiff then moved for leave to either amend her complaints or to present motions to amend in the district court. We denied the motion. Plaintiff then filed petitions for writs of mandamus and certiorari, both of which were denied by the Supreme Court in 1981.

Mrs. Cannon filed a single suit against the remaining five defendants, Loyola University of Chicago ("Loyola"), Rush-Presbyterian St. Luke's Medical center ("Rush"), University of Health Sciences/Chicago Medical School ("Chicago Medical"), Southern Illinois University ("S.I.U.") and the University of Illinois ("Illinois"). As in the earlier suits against Chicago and Northwestern, Mrs. Cannon claimed that these five universities' denial of her medical school application constituted sex discrimination in violation of Title IX. Mrs. Cannon also claimed that each defendant violated the Age Discrimination Act of 1975, 42 U.S.C. §§ 6101-6107, and that S.I.U. and Illinois had violated the Civil Rights Act of 1871, 28 U.S.C. § 1983.

The district court held that no relief against any of the defendant universities could be had under the Age Discrimination Act, as that Act had not yet taken effect at the time her applications were rejected. The district court further held that no monetary relief could be obtained from any of the defendants under Title IX, and that the Eleventh Amendment barred the recovery of monetary

relief against S.I.U. and Illinois. The district court entered summary judgment in favor of all five universities, basing those in favor of Rush, Loyola and Chicago Medical on grounds of laches and those in favor of S.I.U. and Illinois on grounds of mootness. We affirmed the judgments in favor of all defendants, but as to those in favor of S.I.U. and Illinois solely on grounds of laches. Mrs. Cannon's present suit, which we now address on appeal, alleges that all seven schools are liable for breach of contract under Title IX.

II.

The dismissal of plaintiff's prior suits against Chicago and Northwestern for failure to state a claim upon which relief could be granted are judgments on the merits and constitute a *res judicata* bar as to those two schools in the action below.

Under the doctrine of *res judicata*, a decision in an earlier action will constitute a complete bar to a later action if (1) the parties to the later suit are the same as or in privity with those in the earlier suit, (2) the later suit alleges the same cause of action as the earlier suit, and (3) a court of competent jurisdiction entered a valid final judgment on the merits in the earlier suit. *Federated Department Stores v. Moitie*, 452 U.S. 394, 398 (1981); *Mandarino v. Pallard*, 718 F.2d 845, 849 (7th Cir. 1983), *cert. denied*, 105 S.Ct. 116 (1984).

Mrs. Cannon does not dispute the first two requirements for application of *res judicata*—identity of parties and identity of causes of action. Both Chicago and Northwestern were parties in the prior action. Although Mrs. Cannon's theory of relief has changed slightly, her complaint is based on the same facts as her previous suits. Mrs. Cannon claimed a right to relief directly under Title IX in the first two suits, while here Mrs. Cannon claims that defendants' alleged violation of Title IX constituted a breach of contract. Thus, while the theory of relief may have changed, the cause of action remains the same.

Cemer v. Marathon Oil Co., 583 F.2d 830 (6th Cir. 1978). Each suit sought to remedy the same single alleged wrong.

The third requirement under the doctrine of *res judicata*, that a court of competent jurisdiction entered a valid final judgment on the merits in the earlier suit, is the only requirement that Mrs. Cannon disputes. The only issue raised is whether the dismissals of Mrs. Cannon's prior suits against Chicago and Northwestern were judgments on the merits. The district court dismissed Mrs. Cannon's prior actions against Chicago and Northwestern pursuant to Rule 12(b)(6) for failure to state a claim upon which relief could be granted. We affirmed on that basis. The Supreme Court denied certiorari. Under Rule 41(b) of the Federal Rules of Civil Procedure the district court's dismissals were adjudicated on the merits. Rule 41(b) provides that:

> "[U]nless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

A dismissal for failure to state a claim under Rule 12(b)(6) is a dismissal within the meaning of Rule 41(b) and therefore constitutes an adjudication on the merits. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 at n.3 (1981); *Bell v. Hood*, 327 U.S. 678, 682 (1945); *Rinehart v. Locke*, 454 F.2d 315, (7th Cir. 1971).

Mrs. Cannon seeks to avoid this result by arguing that the district court dismissal for failure to state a claim resulted in a lack of federal jurisdiction. Essentially, Mrs. Cannon argues that jurisdiction in the prior actions against Chicago and Northwestern was based on 28 U.S.C. § 1343. Since Section 1343 grants jurisdiction only over "any civil action authorized by law," Mrs. Cannon argues that a Rule 12(b)(6) dismissal results in there being no action "authorized by law" and thus results in a lack of federal court jurisdiction.

Mrs. Cannon's argument is without merit for two reasons. First, Mrs. Cannon sought equitable relief and damages of $15,000 in her prior suits against Chicago and Northwestern. Hence, the district court had subject matter jurisdiction under Section 1331 to reach the merits of the complaint.

Second, long standing Supreme Court precedent supports defendants' position that Mrs. Cannon's prior dismissal for failure to state a claim was an adjudication on the merits. In *Bell v. Hood*, *supra*, plaintiff alleged violations of her Fourth and Fifth Amendment rights. The district court dismissed for lack of subject matter jurisdiction under Section 1331 because of its view that no recovery could be had. The circuit court affirmed, and the Supreme Court reversed, stating:

> "Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the Court has assumed jurisdiction over the controversy." 327 U.S. at 681-82.

Thus, Mrs. Cannon's attempt to characterize the dismissal of her prior action for failure to state a claim as "jurisdictional" is precluded by long standing Supreme Court precedent.

III.

The prior judgments in favor of Loyola, Rush, Chicago Medical, S.I.U. and Illinois are also final adjudications on the merits, and bar Mrs. Cannon's suit against these universities.

As with her claims against Chicago and Northwestern, Mrs. Cannon does not dispute that the first two requirements for *res judicata*—identity of parties and identity of cause of action—have been met by the prior judgments in favor of Chicago Medical, Rush, Loyola, S.I.U. and Illinois. Mrs. Cannon argues only that the prior judgments against these defendants were not final judgments on the merits. Quite plainly, the judgment, both as entered by the district court, and this court, disposed of all of the claims asserted against all of the defendants in that action. Indeed, were this not the case, Mrs. Cannon could not have appealed that judgment to this court since the court would have lacked jurisdiction under 28 U.S.C. § 1291 to hear the appeal.

As stated above, Mrs. Cannon brought a claim of unlawful discrimination under the Age Discrimination Act of 1975, 42 U.S.C. § 1601 *et seq.* against all defendants. These claims were dismissed for failure to state a claim upon which relief could be granted. The district court limited Mrs. Cannon's claim to an action for equitable relief and entered summary judgment in favor of defendants in Mrs. Cannon's Title IX claim on the basis of laches. Her Section 1983 claim against S.I.U. and Illinois was dismissed on the basis of laches as well.

In a second order, dated June 15, 1983, the district court vacated the prior order to the extent it granted judgment on the Section 1983 claims against S.I.U. and Illinois on grounds of laches. In that same order, the district court held that Mrs. Cannon was barred by the Eleventh Amendment from recovering damages from S.I.U. or Illinois, and that her claims for equitable relief under Section 1983 were moot.

We affirmed the judgments entered against Mrs. Cannon, but in regard to the Section 1983 claims against S.I.U. and Illinois did so only on the grounds of laches.

For purposes of applying the doctrine of *res judicata* it is this court's prior ruling that is controlling.

> "A judgment affirmed on appeal has a conclusive effect, but if the appellate court affirms on grounds that differ from those relied on by the lower court, the conclusiveness of the judgment as *res judicata* and as collateral estoppel are determined by the appellate decision." IB Moore's Federal Practice § 0.416[2] at 518.

Under this analysis, the district courts' dismissal of Mrs. Cannon's ADEA claim for failure to state a claim upon which relief could be granted was clearly a decision on the merits of that claim. The holding of *Bell v. Hood* that a dismissal for failure to state a claim calls for judgment on the merits is directly applicable.

The disposition of Mrs. Cannon's Title IX and Section 1983 claims on grounds of laches is equally a judgment on the merits. In *McCrocklin v. Fowler*, 411 F.2d 580 (7th Cir. 1969), we held that the district court correctly dismissed a suit because a privy of the plaintiff had brought a prior action on the same claim in the Court of Claims, and the prior action had been dismissed on the basis of the statute of limitations and laches. The district court noted that "the prior suit in the Court of Claims was on the merits" and we affirmed. Thus, all three requirements for application of *res judicata* have been met. The present suit is barred and was properly dismissed by the district court.

IV.

The district court did not abuse its discretion when it awarded defendants their fees on the motion to dismiss. We are in complete agreement with the district court that Mrs. Cannon's filing of a complaint in this action was an egregious and blatant violation of Rule 11 of the Federal Rules of Civil Procedure. Under Rule 11 an attorney's signature on a pleading

> constitutes a certificate by him that he has read the pleading . . . that to the best of his knowledge, information and belief formed after reasonable inquiry

it is well grounded in fact and is warranted by existing law or a good faith argument for extension, modification or reversal of existing law and that it is not interposed for any improper purpose.

Mrs. Cannon's claim is barred by well established principles of *res judicata*, as enunciated by the United States Supreme Court. Mrs. Cannon's ten year history of litigation demonstrates her penchant for harassing the defendants. Where a violation of Rule 11 occurs, the court is expressly given the power to award the opposing party his costs, including attorney fees, incurred by reason of the violation. It is only fair that Mrs. Cannon bear the attorney fees and costs plus the costs of this appeal that her penchant for litigation has caused non profit institutions of higher learning for far too long.

For the foregoing reasons the judgment of the district court is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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JUDGMENT – ORAL ARGUMENT

United States Court Of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
February 25, 1986.

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge

GERALDINE G. CANNON,
Plaintiff-Appellant,

vs.

LOYOLA UNIVERSITY OF CHICAGO, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 84 C 8063

Judge Marvin E. Aspen

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

United States Court Of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
April 3, 1986.

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge

GERALDINE G. CANNON,
Plaintiff-Appellant,

vs.

LOYOLA UNIVERSITY OF CHICAGO, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

ORDER

On consideration of the petition for rehearing filed in the above entitled cause by Geraldine G. Cannon, Plaintiff-Appellant, and all of the judges on the original panel have voted to deny a rehearing and suggestion for rehearing *en banc*. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing and suggestion for rehearing *en banc* be, and the same is hereby DENIED.

United States Court Of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
May 27, 1986.

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge

GERALDINE G. CANNON,
Plaintiff-Appellant,

vs.

LOYOLA UNIVERSITY OF CHICAGO,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 84 C 8063

Marvin E. Aspen, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above entitled cause by Geraldine G. Cannon, plaintiff-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny the petition for rehearing and suggestion for rehearing *en banc*. Accordingly,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing and suggestion for rehearing *en banc* be and the same is hereby DENIED.